AIR GUNUNG ENTERPRISE SDN. BHD. & ANOR. *a*

v.

YEE CHENG CHAI

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA *b*
DATO' V.C. GEORGE JCA
DATO' AHMAD FAIRUZ SHEIKH ABDUL HALIM J
[CIVIL APPEAL NO: N-02-284-95]
28 NOVEMBER 1995

TORT: *Trespass - Trespass to land - Whether claim made out - Discrepancies in evidence - Whether adequately explained - Special damages - Whether proper quantum awarded.* *c*

In this claim for trespass, the respondent alleged that on 27 October 1983 the appellants had wrongly excavated earth from his land. Evidence of such *d* encroachment was found in a survey plan prepared by a surveyor but that plan, however, was dated 22 November 1922 i.e about a year prior to the alleged trespass. In the Court below, the discrepancies in the dates were explained by the relevant surveyor, and the trial Judge in the circumstances found the appellants liable and consequently awarded special damages to the *e* respondent amounting to RM216,000. The appellants appealed. Before the learned appeal Judges, the judgment below was attacked on the grounds that the claim for trespass, and hence for special damages, had not been made out.

Held: *f*

Per Siti Norma Yaakob JCA (delivering the judgment of the Court):

There is no reason to disturb the findings of the trial Judge. From the record, there is ample evidence provided by the oral testimony and the undisputed *g* contemporaneous documents, that the tort of trespass has been committed by the appellants. Likewise, the award of special damages was fully supported by the evidence of the Civil and Structural Engineer, whose evidence the appellants never cross-examined.

[Appeal dismissed] *h*

[Bahasa Malaysia *Translation of Headnotes]*

TORT: *Pencerobohan - Pencerobohan terhadap tanah - Samada tuntutan dibuktikan - Perbezaan dalam keterangan - Samada diterangkan dengan secukupnya - Gantirugi khas - Samada kuantum yang wajar telah* *i* *diberikan.*

Dalam tuntutan untuk pencerobohan ini, responden mengatakan bahawa pada 27 Oktober 1983 perayu telah secara salah mengeluarkan tanah daripada tanahnya. Keterangan mengenai pencerobohan sedemikian didapati dalam pelan ukur yang telah disediakan oleh jurukur tetapi pelan itu, bagaimanapun, bertarikh 22 November 1992 iaitu lebih kurang satu tahun sebelum pencerobohan yang dikatakan itu. Dalam Mahkamah dibawah, perbezaan pada tarikh-tarikh ini telah diterangkan oleh jurukur yang relevan, dan Hakim perbicaraan dalam keadaan itu mendapati perayu bertanggungan dan dengan itu memberikan gantirugi khas kepada perayu yang berjumlah sebanyak RM216,000. Perayu telah merayu. Dihadapan Hakim rayuan yang bijaksana, penghakiman dibawah telah dipertikaikan atas alasan bahawa tuntutan untuk pencerobohan, dan oleh itu untuk gantirugi khas, telah tidak dibuktikan secukupnya.

Diputuskan:

Oleh Siti Norma Yaakob HMR (menyampaikan penghakiman Mahkamah):

Tidak terdapat apa-apa sebab untuk mengganggu keputusan yang dibuat oleh Hakim perbicaraan. Daripada rekod, terdapat keterangan mencukupi yang diberikan oleh testemoni lisan dan dokumen-dokumen semasa yang tidak dapat dipertikaikan, bahawa tort pencerobohan telah dilakukan oleh perayu. Begitu juga, award gantirugi khas telah disokong sepenuhnya oleh keterangan yang diberikan oleh Jurutera Awam dan Struktural yang mana keterangan itu telah tidak diperiksa-balas oleh perayu-perayu tersebut.

[Rayuan ditolak]

For the appellants - Damian Lim Kwi Hoong; M/s. Chin & Co.
For the respondent - S.K. Lingam; M/s. S.K. Lingam & Co.

JUDGMENT

Siti Norma Yaakob JCA:

This appeal stems from a claim for trespass to land brought by the respondent, the registered owner of land, EMR 333, Lot 649, Mukim and District of Port Dickson, against the appellants, the agent and contractor respectively employed by a third party, Koperasi Perusahaan Baja dan Kertas (M) Sdn. Bhd. to work and develop the third party's land which lies adjacent to the respondent's land. The third party was the third defendant in the Court below and although judgment for RM216,000 special damages was entered against all 3 defendants, the 3rd defendant has not appealed against that judgment.

Before us, the judgment is attacked by the two appellants on the grounds that the claim for trespass has not been made out and likewise the claim for special damages.

Although the trespass is alleged to have taken place on 27 October 1983 by the appellants excavating earth from the respondent's land, evidence of such encroachment is found in a survey plan, P5 dated almost a year earlier, 22 November 1982.

However this was explained by the respondent. Mr. K.V. Joseph, PW5, the licensed surveyor who signed P5 testified that in 1982, he was instructed by the respondent to do a contour survey for the purpose of verifying the boundary of the very same piece of land which is alleged to have been encroached into. That survey was completed in November 1982. In 1983, following the alleged encroachment, the respondents instructed PW5 again to do a detailed investigation as to the extent of the encroachment on the western boundary of the land which adjoins the 3rd defendant's land. That detailed investigations were conducted by PW5's assistant, Mr. Choo Min Fah, PW3, on 28 October 1983. PW3, also a surveyor, completed the investigation on 8 November 1983. His findings were given to the draftsman who made the necessary entries into the survey plan, P5, that was prepared earlier in 1982, which still carried the original date of completion 22 November 1982. When asked why the 1982 contour plan was still relied upon, PW3 testified as follows:

> Because contour plan of 1982 was correct. Our mistake we did not put the 1983 date ... I can't remember who did the contour plan in 1982. I checked it was correct.

There is also evidence that PW5 who had the final say in the surveys done in 1982 and 1983 signed P5 for unlike PW3, he was a licensed surveyor and authorised by law to make such endorsement.

There was however no cross-examination in respect of the encroachments shown in P5.

Apart from PW3 and PW5, there is also the oral testimony of the respondent, PW1, his wife, PW6 and the Engineer, PW4 on the trespass, not to mention the contemporaneous documents in the nature of the police report (page 95 of the appeal records) lodged by the respondent on 26 October 1983, the date of the alleged encroachment and the photographs (at page 107 of the appeal records) taken on 26 October 1983.

From the notes of proceedings, we are satisfied that there is ample evidence provided by the oral testimony and the undisputed contemporaneous documents, that the tort of trespass has been committed by the appellants and we see no reason to disturb the findings of the trial Judge.

Likewise his findings on the quantum of the special damages claimed, evidence of which came from the Civil and Structural Engineer, PW4 who prepared P7, which is his report on the quantum of damages needed to put right the injury done to the respondent's land as a result of the appellants' trespass. PW4 was never cross-examined on P7.

As we had no reason to disturb the findings of the trial Judge we dismissed the appeal with costs and directed that the deposit be paid to the respondent to account of his taxed costs.

Reported by W.A. Sharif